

# HOW BATTLES OVER COLLECTION OF SALES TAXES ON ONLINE SALES WILL AFFECT SMALL BUSINESSES—ESPECIALLY AFFILIATES OF LARGE SELLERS LIKE AMAZON.COM

AMELIA LANDENBERGER \*

## I. INTRODUCTION

Since its founding, Amazon.com and many similar online retailers have not collected sales taxes on online sales.<sup>1</sup> This uncollected sales tax could be a source of additional revenue, which might be especially appealing for states facing budget cuts. The recent battles between Amazon.com and individual states over collection of sales taxes have had negative consequences for entrepreneurs, especially Amazon Affiliates, who gain a percentage of sales by referring customers to Amazon.com. One solution to Amazon's problem would be national legislation on the issue. However, this legislation might make online sales more difficult for small businesses that sell goods over the internet, as they would have to find some way of dealing with the intricacies of state and local sales taxes in order to sell on the internet.

Sales taxes date back at least as far as the ancient Egyptians,<sup>2</sup> but the specific problems of interstate sales are much more recent. "Shoppers for years have crossed state lines to get lower rates. Before the Internet, many catalog-retailers didn't charge tax to out-of-state customers."<sup>3</sup> Sales taxes began to be generally used in the United States during the Great Depression, as states struggled to find alternative sources of revenue to replace dwindling property taxes.<sup>4</sup> "After the Depression began, local

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\* Juris Doctor, The Ohio State University Moritz College of Law, expected 2013.

<sup>1</sup> Stu Woo, *Amazon Battles States over Sales Tax*, WALL ST. J. (Aug. 3, 2011), <http://online.wsj.com/article/SB10001424053111904772304576468753564916130.html>.

<sup>2</sup> "Tomb paintings depict tax collectors in Egypt at least as early as 2000 BC, and sales taxes on individual commodities, such as cooking oil, can be traced to that time." William F. Fox, *History and Economic Impact*, U. OF TENN. CTR. FOR BUS. AND ECON. RES. (Mar. 13, 2002), available at <http://cber.bus.utk.edu/staff/mnmecon338/foxipt.pdf>.

<sup>3</sup> Woo, *supra* note 1.

<sup>4</sup> "Mississippi enacted the first modern general sales tax in 1930. No revenue innovation has been greeted so enthusiastically by state legislatures. Twenty-one more states and the Territory of Hawaii adopted the sales tax by 1940, with 12 of them doing so in 1933 alone." Ronald Snell, *State Finance in the Great*

government property tax collections did not again reach the 1927 level until 1944.<sup>5</sup> For states, it took until 1952 to reach the 1927 level, although in the interval, states had reduced their reliance upon the tax.”<sup>6</sup> Forty-five of the fifty states currently collect state sales taxes.<sup>7</sup> Alaska, Delaware, Montana, New Hampshire, and Oregon do not have state sales taxes, but Alaska and Oregon collect some local taxes, New Hampshire taxes food in restaurants and rooms in hotels, and Delaware and Montana have “transient lodging” taxes.<sup>8</sup>

Of the states that do collect sales tax, the taxes range from 2.9% in Colorado to 8.25% in California.<sup>9</sup> Given the condition of the economy, states are looking for more money to balance their budgets, as “some 42 states and the District of Columbia have closed or are working to close \$103 billion in shortfalls for the coming fiscal year (FY2012).”<sup>10</sup> One source of additional revenue for these states could be sales taxes collected on online purchases. While consumers in most states are required to report such purchases and pay sales tax on them, few do: “In Ohio, for example, over 60% of households said they made online purchases last year—but sales taxes for such purchases were paid on less than 1% of state income tax returns.”<sup>11</sup>

Jeff Bezos, the founder of Amazon.com, knew that sales tax would be an important issue, and decided to locate his business in a state with a small

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*Depression*, NAT’L CONF. OF ST. LEGISLATURES 5 (Mar. 2009), available at <http://www.ncsl.org/print/fiscal/STATEFINANCEGREATDEPRESSION.pdf>.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *State Sales Tax Rates and Food and Drug Exemptions*, FED. OF TAX ADMIN. (Feb. 2011), available at <http://www.taxadmin.org/fta/rate/sales.pdf>.

<sup>8</sup> *Sales and Use Tax*, ALASKA DEPT. OF REVENUE, <http://www.tax.alaska.gov/programs/programs/index.aspx?10002> (last visited Mar. 27, 2012); *Sales Tax Information*, OR. DEPT. OF REVENUE, <http://www.oregon.gov/DOR/salestax.shtml> (last visited Mar. 27, 2012); *Food and Beverage Tax*, CITY OF ASHLAND, <http://www.ashland.or.us/Page.asp?NavID=9180> (last visited Mar. 27, 2012) (discussing that the city of Ashland, Oregon, has “the only voter approved sales tax in Oregon. A five percent tax is collected on all prepared food sold in Ashland.”); *Does NH Have an Income Tax or Sales Tax?*, N. H. DEPT. OF REV. ADMIN., <http://www.nh.gov/revenue/faq/gti-rev.htm#meals-rental> (last visited Mar. 27, 2012); *Lodging Tax Collection*, DEL. CODE, <http://delcode.delaware.gov/title30/c061/sc01/index.shtml> (last visited Mar. 27, 2012); *Lodging Facility Sales and Use Tax*, MONT. DEPT. OF REV., [http://revenue.mt.gov/forindividuals/taxes\\_licenses\\_fees\\_permits/Miscellaneous\\_Taxes\\_and\\_Fees/lodging.mcpx](http://revenue.mt.gov/forindividuals/taxes_licenses_fees_permits/Miscellaneous_Taxes_and_Fees/lodging.mcpx) (last visited Mar. 27, 2012).

<sup>9</sup> *State Sales Tax Rates and Food and Drug Exemptions*, FED. OF TAX ADMIN. (Feb. 2011), available at <http://www.taxadmin.org/fta/rate/sales.pdf>.

<sup>10</sup> Elizabeth McNichol, Phil Oliff & Nicholas Johnson, *States Continue to Feel Recession’s Impact*, CTR. ON BUDGET & POL’Y PRIORITIES (June 11, 2011), available at <http://www.cbpp.org/files/9-8-08sfp.pdf>.

<sup>11</sup> Brad Tuttle, *Amazon Supports a Bill Forcing Online Shoppers to Pay Sales Tax*, TIME.COM (Nov. 11, 2011), <http://moneyland.time.com/2011/11/11/amazon-supports-a-bill-forcing-online-shoppers-to-pay-sales-tax/#ixzz1dbrjLZjy>.

population because he knew he would be forced to collect sales tax in that state. He explained his decision:

“It sounds counterintuitive, but physical location is very important for the success of a virtual business. We could have started Amazon.com anywhere. We chose Seattle because it met a rigorous set of criteria. It had to be a place with lots of technical talent. It had to be near a place with large numbers of books. It had to be a nice place to live—great people won’t work in places they don’t want to live. Finally, it had to be in a small state. In the mail-order business, you have to charge sales tax to customers who live in any state where you have a business presence. It made no sense for us to be in California or New York.”<sup>12</sup>

Bezos even considered trying to locate his business out of the reach of any state’s sales tax, “on an Indian reservation near San Francisco.”<sup>13</sup>

#### A. *Quill Corp. v. North Dakota*

In 1967, *National Bellas Hess, Inc. v. Department of Revenue of State of Illinois* created a bright line rule that did not allow the state of Illinois to require a mail-order company from Missouri to collect Illinois use tax on purchases shipped to Illinois.<sup>14</sup> The court noted that it would require use tax collection “[w]here the sales were arranged by local agents in the taxing State”<sup>15</sup> or where a mail order company had retail stores in that state,<sup>16</sup> “[b]ut the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.”<sup>17</sup>

In 1992, North Dakota “attempt[ed] to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State.”<sup>18</sup> In

<sup>12</sup> William C. Taylor, *Who’s Writing the Book on Web Business*, FAST CO. (Oct. 31, 1996), <http://www.fastcompany.com/magazine/05/starwave2.html>.

<sup>13</sup> *Id.* Bezos ruefully acknowledged that he could not avoid sales taxes by founding his business on a Native American reservation because “[u]nfortunately, the government thought of that first.” *Id.* While “on-reservation sales by Indians to Indians” are not taxed when the buyers are not Native Americans, the state can still compel sales tax collection by Native Americans. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480–483 (1976).

<sup>14</sup> *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of State of Ill.*, 386 U.S. 753, 754 (1967).

<sup>15</sup> *Id.* at 757.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 758.

<sup>18</sup> *Quill Corp. v. N. D. By & Through Heitkamp*, 504 U.S. 298, 301 (1992).

*Quill Corp. v. North Dakota By & Through Heitkamp*, the Supreme Court held that the requirement for out of state vendors to collect that tax violated the Commerce Clause, distinguishing Commerce Clause tests from those tests used under the Due Process Clause by saying, “[a]ccordingly, while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.”<sup>19</sup> The Due Process Clause does not prevent collection of sales taxes in *Quill* because by selling in North Dakota, Quill had the minimum contacts.<sup>20</sup> But the commerce clause prevents collection of sales taxes in this instance because Quill did not have a substantial nexus. The Court cited *Bellas Hess*, which “stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.”<sup>21</sup> While the Supreme Court did not allow North Dakota to collect the sales tax in *Quill*, it did leave for Congress the option of creating national legislation by which the states can require interstate companies to collect use taxes.<sup>22</sup> Such legislation has actually been proposed in Congress, but it remains to be seen whether it will pass.

## II. PROBLEM: EFFECT ON SMALL BUSINESSES, ESPECIALLY AFFILIATES

Kayla Fay, a mother in North Carolina, made \$40,000 a year from her websites, most of that from affiliate programs with Amazon and another

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<sup>19</sup> *Id.* at 305.

<sup>20</sup> “The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State.” *Id.* at 308.

<sup>21</sup> *Id.* at 311.

<sup>22</sup> When deciding whether or not to reject the *Bellas Hess* rule, the court explained:

This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. Indeed, in recent years Congress has considered legislation that would “overrule” the *Bellas Hess* rule. Its decision not to take action in this direction may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest. Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.”

*Id.* at 318.

online company.<sup>23</sup> When North Carolina passed a law requiring online retailers with affiliates in the state to collect sales taxes, Amazon ended its Amazon Associates Program in North Carolina.<sup>24</sup>

Lydia Walshin, who lives in Scituate, [Rhode Island] depended on Amazon affiliate marketing to monetize her cooking blog, ThePerfectPantry.com. After Amazon cut off its affiliates, Walshin moved her operations to Massachusetts, where she also has a home and a bank account, and Amazon had her back up and running within 24 hours.<sup>25</sup>

Another entrepreneur, Owen Johnson,

was earning 'small, but growing income' from his personal blog and a site he runs called Connect Providence as an affiliate before Amazon ended the program [in Rhode Island]. Now he is wondering whether to move his business out of state. 'You're creating an environment of uncertainty in which to do business,' he said.<sup>26</sup>

These three individuals were members of Amazon's Associates Program. Members promote products sold on Amazon, usually through a blog or website. When a customer clicks through to Amazon from one of the Associate's links, and then either purchases something within twenty-four hours or adds something to the shopping cart which is then purchased within eighty-nine days, the Associate earns between four and fifteen percent of the purchase price.<sup>27</sup>

<sup>23</sup> Mark Binker, *Amazon Warns N.C. Affiliates about Tax Issue*, NEWS-RECORD.COM (June 17, 2009), [http://www.news-record.com/content/2009/06/17/article/amazon\\_warns\\_nc\\_affiliates\\_about\\_tax\\_issue](http://www.news-record.com/content/2009/06/17/article/amazon_warns_nc_affiliates_about_tax_issue).

<sup>24</sup> Mark Binker, *Amazon Cuts Relationship with N.C. Affiliates*, NEWS-RECORD.COM (June 26, 2009), [http://www.news-record.com/content/2009/06/26/article/amazon\\_cuts\\_relationships\\_with\\_affiliates](http://www.news-record.com/content/2009/06/26/article/amazon_cuts_relationships_with_affiliates) [hereinafter *Amazon Cuts Relationship with N.C. Affiliates*].

<sup>25</sup> Ted Nesi, *'Amazon Tax' Has Not Generated Revenue*, PROVIDENCE BUS. NEWS (Dec. 21, 2009), [http://www.pbn.com/detail.html?sub\\_id=2976531d0961&page=2](http://www.pbn.com/detail.html?sub_id=2976531d0961&page=2).

<sup>26</sup> *Id.*

<sup>27</sup> *Associates Program Operating Agreement*, AMAZON.COM, [https://affiliate-program.amazon.com/gp/associates/agreement?ie=UTF8&pf\\_rd\\_t=501&ref\\_amb\\_link\\_84018271\\_6&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_p=&pf\\_rd\\_s=assoc-right-1&pf\\_rd\\_r=&pf\\_rd\\_i=assoc\\_join\\_menu](https://affiliate-program.amazon.com/gp/associates/agreement?ie=UTF8&pf_rd_t=501&ref_amb_link_84018271_6&pf_rd_m=ATVPDKIKX0DER&pf_rd_p=&pf_rd_s=assoc-right-1&pf_rd_r=&pf_rd_i=assoc_join_menu) (last visited Mar. 27, 2012); *Associates Program Advertising Fee Schedule*, AMAZON.COM, [https://affiliate-program.amazon.com/gp/associates/help/operating/advertisingfees?ie=UTF8&pf\\_rd\\_t=501&ref\\_amb\\_link\\_353005802\\_9&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_p=&pf\\_rd\\_s=assoc-center-1&pf\\_rd\\_r=&pf\\_rd\\_i=assoc\\_operating](https://affiliate-program.amazon.com/gp/associates/help/operating/advertisingfees?ie=UTF8&pf_rd_t=501&ref_amb_link_353005802_9&pf_rd_m=ATVPDKIKX0DER&pf_rd_p=&pf_rd_s=assoc-center-1&pf_rd_r=&pf_rd_i=assoc_operating) (last visited Mar. 27, 2012) [hereinafter *Operating Agreement*].

Amazon is not the only large retailer to have such a program, although it is probably the most famous. Staples has a similar program,<sup>28</sup> and many well known brands such as Target, Kmart, Netflix, Sears, OfficeMax, SamsClub, and Verizon have affiliate programs administered by Google's Affiliate Network.<sup>29</sup> Unlike Amazon, however, most of these retailers have physical retail stores in most states, which is a sufficient nexus to force them to collect sales tax. Target, for example, collects sales tax in all of the states that have a sales tax.<sup>30</sup>

Overall, "e-commerce sales have grown from \$995.0 billion in 1999 to \$2,385 billion by 2006."<sup>31</sup> Amazon.com is currently the largest online retailer,<sup>32</sup> but collection of sales taxes could have a huge negative impact on Amazon's sales: "Credit Suisse recently estimated that if Amazon were forced to collect sales taxes in all states, it would lose as much as \$653 million in sales this year, or 1.4% out of an estimated \$45.5 billion in revenue."<sup>33</sup> Amazon has another good reason why it does not want to collect sales tax. Retailers can be forced to pay penalties when they collect the wrong amount of sales tax, and it is complicated to collect the correct amount because of the many different local taxes: "J.C. Penney, for example, has had to pay penalties on miscalculations of online sales taxes. Wayne Zakrewski, the company's tax lawyer, says because of the complicated calculations, 'errors are more often the case than not.'"<sup>34</sup>

This is one of the reasons why forced collection of sales taxes by online retailers could be very bad for small businesses. Even large businesses like J.C. Penney struggle to comply with the many different sales tax requirements, making online sales tax collection prohibitively costly for small businesses. Small businesses might be forced to use a larger business as a facilitator, by selling their products through a website such as Amazon Marketplace or eBay. Then small businesses would have to pay a

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<sup>28</sup> The Staples affiliate program, however, is not as lucrative as Amazon's, as it excludes big ticket items such as "[c]opiers, fax machines, printers, laptops, desktops" and only gives up to 5%, and that only on office supplies such as tape and rubber bands. *Affiliate Program*, STAPLES.COM, <http://www.staples.com/sbd/content/about/affiliate/> (last visited Mar. 27, 2012).

<sup>29</sup> *Google Affiliate Network*, GOOGLE.COM, <http://www.google.com/ads/affiliatenetwork/publishers/#tab0=1> (last visited Mar. 27, 2012).

<sup>30</sup> This fact is frequently cited by those seeking to force Amazon to collect sales tax, as Amazon facilitates online sales for Target, and therefore facilitates the collection of sales taxes on Target.com's online sales. *All About Sales Tax*, TARGET.COM, [http://www.target.com/HelpContent?help=/sites/html/TargetOnline/help/orders\\_and\\_shipping/sales\\_tax/sales\\_tax.html](http://www.target.com/HelpContent?help=/sites/html/TargetOnline/help/orders_and_shipping/sales_tax/sales_tax.html) (last visited Mar. 27, 2012).

<sup>31</sup> Donald Bruce, William Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, U. OF TENN. CTR. FOR BUS. AND ECON. RES. (Apr. 13, 2009), available at <http://cber.utk.edu/ecommerce/ecom0409.pdf>.

<sup>32</sup> Woo, *supra* note 1.

<sup>33</sup> *Id.*

<sup>34</sup> Robert Matthews, *Some States Push to Collect Sales Tax from Internet Stores*, WALL ST. J., Sept. 30, 2005, at B1.

percentage to the facilitating company to avoid dealing with complicated sales tax calculations. This would still leave small businesses at a disadvantage to larger businesses with better technology and accounting departments.

But many states are facing serious budget issues, and many are trying to collect sales taxes from online sales in an attempt to pull in some more tax money to help their budgets. The states would be happy to collect extra sales taxes, especially since they may be missing as much as 11–12 billion dollars in state and local taxes nationally.<sup>35</sup>

As the states battle with Amazon, small businesses suffer. When the states try to collect sales taxes on online purchases, Amazon cuts its affiliates to avoid being forced to collect sales tax. These affiliates were mostly entrepreneurs who are now unemployed. The state loses the revenue from the income taxes on the now-unemployed affiliates, and in some cases is unable to collect any more sales taxes, since by getting rid of its affiliates, Amazon is not required to collect sales taxes on its online sales.<sup>36</sup>

Forcing Amazon to collect sales taxes may just hurt small businesses more. Affiliates will lose revenue, and shoppers driven from Amazon by rising prices may only go to other large retailers rather than buying from small businesses. Furthermore, small businesses that sell online would now be forced to deal with the intricacies of the various sales tax laws, which would make it very costly for small businesses to sell online.

### III. CAUSE: STATE LAWS ATTEMPT TO COLLECT MONEY AND BALANCE BUDGETS

Since its founding, Amazon has collected sales taxes in its home state of Washington. It could hardly do otherwise, as its headquarters constitute a clear physical presence in the state. It also collects sales tax in Kansas, Kentucky and North Dakota, where it has a physical presence.<sup>37</sup> “It avoids collecting in several other states where it has warehouses by assigning their ownership to a subsidiary.”<sup>38</sup> For years, both Amazon and the other states have been happy with this arrangement, but recent economic conditions have caused many states to reevaluate their position, and consider changing their laws to require Amazon to collect sales taxes because of its warehouses or affiliates.

<sup>35</sup> Bruce, Fox & Luna, *supra* note 31.

<sup>36</sup> Nesi, *supra* note 25.

<sup>37</sup> Verne Kopytoff, *Amazon Pressured on Sales Tax*, N.Y. TIMES (Mar. 13, 2011), <http://www.nytimes.com/2011/03/14/technology/14amazon.html?pagewanted=all>.

<sup>38</sup> *Id.*

In addition to pressure to balance budgets, states are also under pressure from Amazon's competitors, who want Amazon to be forced to collect sales tax.

Wal-Mart Stores Inc., Target Corp. and other large retailers are ratcheting up a political campaign to force Amazon.com Inc. to collect sales taxes, sensing opportunity in the budget crises gripping statehouses nationwide. The big-box stores are backing a coalition called the Alliance for Main Street Fairness, which is leading efforts to change sales-tax laws in more than a dozen states including Texas and California. [...] Many of America's largest store chains—including Wal-Mart, Target, Best Buy Co., Home Depot Inc. and Sears Holdings Corp.—are involved in the campaign, lobbying legislators and increasingly taking public swipes at Amazon.<sup>39</sup>

Members of the Alliance for Main Street Fairness ("Alliance") say they are only looking for fairness, but an Amazon representative said the other companies "covet" Amazon's affiliate program.<sup>40</sup> These companies are in competition with Amazon, and hope that if Amazon is forced to collect sales tax, consumers will choose to shop in physical stores rather than online.

In 2008, New York passed a law requiring any online company with any affiliates in the state to begin collecting sales tax.<sup>41</sup> Amazon responded by filing a lawsuit, alleging that the New York law violated the Commerce Clause, Equal Protection Clause, and Due Process.<sup>42</sup> The court battle is ongoing, but Amazon is collecting sales tax in New York until the case is decided.<sup>43</sup>

When other states sought to pass similar laws, Amazon dropped its affiliates in those states in order to avoid being forced to collect sales taxes there. Currently, residents of North Carolina, Rhode Island, Connecticut, Colorado, Arkansas and Illinois are not eligible to become members of the Amazon Associates Program.<sup>44</sup> All of these states passed laws similar to the

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<sup>39</sup> Miguel Bustillo & Stu Woo, *Retailers Push Amazon on Taxes*, WALL ST. J. (Mar. 17, 2011), <http://online.wsj.com/article/SB10001424052748704396504576204791377862836.html>.

<sup>40</sup> *Id.*

<sup>41</sup> Saul Hansell, *Amazon Sues over State Law on Collection of Sales Tax*, N.Y. TIMES (May 2, 2008), <http://www.nytimes.com/2008/05/02/nyregion/02amazon.html>.

<sup>42</sup> *Amazon.com, LLC v. N.Y. State Dept. of Taxation & Fin.*, 81 A.D.3d 183, 191 (2010).

<sup>43</sup> *Id.* at 207.

<sup>44</sup> *Operating Agreement*, *supra*, note 27.



one in New York, and in all of these cases, Amazon retaliated by dropping all of its affiliates in each state.<sup>45</sup>

California, Texas, Tennessee, and Indiana have all come to agreements with Amazon. In California, Amazon will not have to collect sales taxes until 2012, unless federal legislation creates a national sales tax collection policy first.<sup>46</sup> After a battle with Texas over sales tax collection, Amazon agreed to “invest \$300 million in five or six warehouse and distribution centers in the state, employing 6,000 people, if lawmakers would let the company operate for four-and-a-half years without collecting sales taxes.”<sup>47</sup> In Tennessee, Amazon has agreed to collect sales taxes in 2014, in exchange for building new distribution centers there.<sup>48</sup> In Indiana, Amazon agreed to collect sales taxes after 2014, or within ninety days of the passage of national sales tax legislation, and Indiana’s governor spoke in favor of national sales tax legislation, which Amazon supports.<sup>49</sup> More deals with states are likely to follow, as Amazon seems to anticipate national legislation in a few years, but is hoping to continue to avoid collection of sales tax in the meantime.

#### A. New York

The recent surge in online sales tax collection laws came from New York. In 2008, New York passed a law requiring any online company with any affiliates in the state to begin collecting sales tax.<sup>50</sup> The law specifically required a seller to collect sales tax “if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers,

<sup>45</sup> See *Amazon Cuts Relationship with N.C. Affiliates*, *supra* note 24; Susan Haigh, *Conn. Gets Tough with Amazon, Pushing on with Tax*, BLOOMBERG BUSINESSWEEK (Oct. 9, 2011), <http://www.businessweek.com/ap/financialnews/D9Q8TV3O1.htm>; Miles Moffeit & Jessica Fender, *Amazon.com Drops Colorado Retailers After Tax Law Enacted*, DENV. POST (Mar. 9, 2010), [http://www.denverpost.com/commented/ci\\_14637785](http://www.denverpost.com/commented/ci_14637785); Nesi, *supra* note 25; Kyung M. Song, *Tax-Free Shopping Doomed?*, CHI. SUN TIMES (Nov. 13, 2011), <http://www.suntimes.com/8747010-417/tax-free-shopping-doomed.html>.

<sup>46</sup> David Streitfeld, *California Lawmakers Give Amazon Tax Reprieve*, N.Y. TIMES (Sept. 10, 2011), <http://www.nytimes.com/2011/09/11/technology/california-votes-to-give-amazon-a-sales-tax-reprieve.html>.

<sup>47</sup> Ross Ramsey, *Let's Make a Deal, Amazon Tells Texas*, N.Y. TIMES (June 23, 2011), <http://www.nytimes.com/2011/06/24/us/24ttramsey.html>.

<sup>48</sup> Erik Schelzig, *Amazon to Collect Tenn. Sales Tax in 2014, Add 2,000 Jobs*, THE SEATTLE TIMES (Oct. 6, 2011), [http://seattletimes.nwsources.com/html/business/technology/2016424133\\_amazontenn07.html](http://seattletimes.nwsources.com/html/business/technology/2016424133_amazontenn07.html).

<sup>49</sup> Tom Davies, *Amazon's Online Sales Tax: Internet Retailer Reaches Deal With Indiana*, HUFFINGTON POST (Jan. 9, 2012), [http://www.huffingtonpost.com/2012/01/09/amazons-sales-tax-indiana\\_n\\_1195406.html](http://www.huffingtonpost.com/2012/01/09/amazons-sales-tax-indiana_n_1195406.html).

<sup>50</sup> Hansell, *supra* note 41.

whether by a link on an internet website or otherwise, to the seller,”<sup>51</sup> and if that seller makes more than \$10,000 a year on transactions referred to it by New York residents.

When other states later passed similar laws, Amazon immediately dropped its affiliates in those states, but in New York, Amazon took another approach. “On April 25, 2008, two days after the bill was signed by the Governor, Amazon filed a complaint seeking declaratory and injunctive relief on the ground that the statute was unconstitutional. Amazon asserted claims for violation of the Commerce, Due Process and Equal Protection Clauses”<sup>52</sup>

The State moved to dismiss and the court granted the motion.<sup>53</sup> Amazon appealed and the Supreme Court, Appellate Division, heard the appeal. It described the case as “a case with far-reaching ramifications because of the exponential expansion of cyberspace in general, and commerce over the Internet in particular.”<sup>54</sup> The court concluded “that on its face the statute does not violate the Commerce Clause.”<sup>55</sup> The court modified the previous judgment “to declare that the statute is constitutional on its face and does not violate the Equal Protection Clause either on its face or as applied and, to reinstate the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses”<sup>56</sup> The case was remanded to the lower court to rule on Amazon’s claims that the statute as-applied violates the Commerce and Due Process Clauses. Amazon will be given a chance to prove that its affiliates are only “advertising on their behalf,” not “soliciting business,”<sup>57</sup> and therefore the law as applied violates the Commerce clause. Amazon also claims that the New York affiliates are not “significantly associated” with Amazon’s ability to do business within the state, as “in 2007, its sales to New York State residents referred by Associates which provided Amazon with New

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<sup>51</sup> McKinney’s New York Tax Law § 1101(b)(8)(vi) (2008).

<sup>52</sup> Amazon.com, LLC v. N. Y. State Dept. of Taxation & Fin., 81 A.D.3d 183, 191 (2010).

<sup>53</sup> *Id.* at 192.

<sup>54</sup> *Id.* at 188.

<sup>55</sup> *Id.* at 196.

It imposes a tax collection obligation on an out-of-state vendor only where the vendor enters into a business-referral agreement with a New York State resident, and only when that resident receives a commission based on a sale in New York. The statute does not target the out-of-state vendor’s sales through agents who are not New York residents. Thus, the nexus requirement is satisfied.

*Id.*

<sup>56</sup> *Id.* at 207.

<sup>57</sup> *Id.* at 203.

York addresses upon registration constituted less than 1.5% of its total sales to New York State residents.”<sup>58</sup>

It is unclear why Amazon took a different approach to the New York law than it took to later laws in other states. Perhaps it did not want to lose all the affiliates in such a populous state, or perhaps Amazon hoped to win its suit and dare the other states to try a similar law. Whatever the reason, instead of dropping all of its affiliates,<sup>59</sup> Amazon has been collecting sales taxes in New York, which “collected \$70 million in sales tax from online retailers, including Amazon, for fiscal year 2009-10.”<sup>60</sup> In the meantime, Amazon is continuing its legal battle in the New York courts.<sup>61</sup> Perhaps inspired by New York’s increased sales tax revenue, other states have been passing similar online sales tax collection laws, but Amazon has reacted very differently in other states.

*B. North Carolina, Rhode Island, Connecticut, Arkansas, Colorado, Illinois*

Currently, residents of North Carolina, Rhode Island, Connecticut, Colorado, Arkansas and Illinois are not eligible to become members of the Amazon Associates Program.<sup>62</sup> All of these states have tried to force Amazon to collect sales taxes. Amazon has retaliated by cutting its affiliates in order to avoid paying the taxes, so in most cases the states do not collect more sales taxes. The real losers are the entrepreneurs who operate as affiliates, who must choose between moving to a new state and finding a new source of income.

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<sup>58</sup> *Amazon.com, LLC*, 81 A.D.3d at 204. The court, in a footnote, points out that Amazon’s annual sales are so large that even 1.5% of the New York sales may be a significant amount:

The affidavit did not supply the sales data upon which the calculation was based. An Internet search, however, found, and we take judicial notice, that on April 22, 2010 Amazon reported that its first quarter sales in Canada and the United States were \$3,780,000,000 (which would translate on an annual basis into North American sales of over \$15,000,000,000). What percentage of those sales were made in New York cannot be quantified from the data available. Nor can the actual percentage made as a result of New York residents accessing New York-based Associates be calculated. Even 1.5% of New York sales by New York Associates, however, would not appear to be an insignificant number.

*Id.* at 208.

<sup>59</sup> New York is not one of the states blacklisted by the Associates Program. *Operating Agreement*, *supra*, note 27.

<sup>60</sup> Kopytoff, *supra* note 37.

<sup>61</sup> Streitfeld, *supra* note 46.

<sup>62</sup> *Operating Agreement*, *supra* note 27.

In North Carolina, Amazon cut ties with all its affiliates after a new law forced the company to collect sales taxes.<sup>63</sup> North Carolina's Department of Revenue ("DOR") then audited Amazon to try to collect sales taxes on items purchased over the past few years.<sup>64</sup> Amazon provided extensive records of its sales, but not of the buyers.<sup>65</sup> The issue arose when North Carolina then asked Amazon to provide the names and addresses of its North Carolina customers.<sup>66</sup> "Amazon maintains that if the DOR obtains the information it seeks, it will possess all information necessary to know the expressive content of all purchases from Amazon by individual North Carolina residents."<sup>67</sup> Amazon filed suit on April 9, 2009, claiming that its customers' First Amendment rights were being violated.<sup>68</sup> The American Civil Liberties Union represented seven North Carolina residents who filed a complaint in intervention.<sup>69</sup> The court granted the motion for summary judgment for Amazon on the issue that the North Carolina DOR's request was a violation of the First Amendment.<sup>70</sup> In January 2011, the case was settled between the seven residents and the DOR.<sup>71</sup>

In December of 2009, six months after Rhode Island had begun requiring online retailers to collect sales tax and Amazon shut down its Associates Program in the state, there was some doubt whether the tax had actually generated any revenue.<sup>72</sup> It was reported that state officials had

<sup>63</sup> *Amazon Cuts Relationship with N.C. Affiliates*, *supra* note 24.

<sup>64</sup> Associated Press, *NC Tax Man Drops Bid to See Amazon Buyers' Data*, SEATTLE TIMES (Feb. 9, 2011), [http://seattletimes.nwsources.com/html/localnews/2014173176\\_apncamazonsalestaxes1stldwritethru.html?syndication=rss](http://seattletimes.nwsources.com/html/localnews/2014173176_apncamazonsalestaxes1stldwritethru.html?syndication=rss).

<sup>65</sup> *Amazon.com, LLC v. Lay*, 758 F. Supp. 2d 1154, 1159 (W.D. Wash. 2010).

As part of an audit of Amazon, the DOR, whose secretary is Defendant Lay, sent a request on December 1, 2009 to Amazon seeking " 'all information for all sales to customers with a North Carolina shipping address by month in an electronic format for all dates between August 1, 2003, and February 28, 2010.' " Notably, the request was made as part of DOR's investigation of Amazon's tax liability, not its customers' tax liability. In response, Amazon provided the DOR with "detailed information about millions of purchases made by North Carolina customers during the relevant time period." Amazon provided the order ID number, seller, ship-to city, county, postal code, the non-taxable amount of the purchase, and the tax audit record identification. In addition, Amazon provided the Amazon Specific Identification Number for every purchase, a number which permits access to the specific and detailed description of the product.

*Id.* (internal citations omitted).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1160.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1169.

<sup>71</sup> Associated Press, *supra* note 64.

<sup>72</sup> Nesi, *supra* note 25.

doubts about the law's effectiveness: "Officials at the R.I. Department of Revenue 'do not believe that there has been any sales tax collected as a result of the Amazon legislation,' said Paul L. Dion, who heads the department's revenue-analysis office."<sup>73</sup>

Connecticut passed a law requiring online retailers with a physical presence in the state to collect sales taxes, and Amazon closed its Associates Program in response a month later.<sup>74</sup> The state was still not content, and is considering trying to collect taxes from the time between the enacting of the law and the ending of Amazon's affiliate program in the state.<sup>75</sup> The state is also considering suing Amazon based on its other connections to Connecticut.<sup>76</sup>

Colorado also passed a law that aimed to force consumers to pay taxes on online purchases:

Colorado HB 1193, enacted in February 2010, required online retailers to provide a detailed purchase report to customers with more than \$500 of annual Colorado purchases by January 31st and to provide a summary purchase report with the total amount of each customer's annual Colorado purchases to the Colorado Department of Revenue by March 31st. This law is currently the subject of a legal challenge brought by the Direct Marketing Association and others. In the meantime, the U.S. District Court has suspended enactment of the law while the legal challenge proceeds.<sup>77</sup>

On March 9, 2010, Amazon cut ties with all of its Colorado Associates because of the new law, which, in Amazon's opinion, "clearly intended to increase the compliance burden to a point where online retailers will be induced to voluntarily collect Colorado sales tax—a course we won't take."<sup>78</sup>

"From 2005 to 2010, Illinois lost an estimated \$183 million each year" in uncollected online sales taxes, according to Illinois Senator Dick Durbin, who proposed national legislation on the issue.<sup>79</sup> Amazon cut its affiliate program in Illinois after a law was passed in March of 2011 that would

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<sup>73</sup> *Id.*

<sup>74</sup> Haigh, *supra* note 45.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Sales Tax Requirements*, AMAZON.COM, [http://www.amazon.com/gp/help/customer/display.html/ref=hp\\_468512\\_usetax?nodeId=468512#usetax](http://www.amazon.com/gp/help/customer/display.html/ref=hp_468512_usetax?nodeId=468512#usetax) (last visited Mar. 28, 2012).

<sup>78</sup> Moffeit, *supra* note 45.

<sup>79</sup> Song, *supra* note 45.

have forced Amazon to collect sales tax.<sup>80</sup> Amazon said “it would eliminate its affiliate program there on April 15.”<sup>81</sup> Despite the new tax, Illinois has not actually raised much revenue, as termination of affiliates has meant that Amazon still does not collect sales tax in Illinois. In order to continue in the affiliate program, two large affiliates actually moved their businesses out of state: “CouponCabin and its employees departed River North for Whiting, Ind. Rockton-based FatWallet moved a few miles north to Beloit, Wis., in April, a spokesman says. Each employs fewer than 100 people.”<sup>82</sup>

Barnes and Noble, one of Amazon’s competitors, wrote an open letter to Amazon’s dropped Illinois Associates, inviting them to become associates for Barnes and Noble instead. The letter said, “Barnes & Noble is disappointed to hear that Amazon would threaten small businesses’ livelihood rather than comply with state law. Here at Barnes & Noble, we value the 13,000+ members of our affiliate program worldwide . . . . If Amazon doesn’t want you, we do!”<sup>83</sup>

The affiliates in these states have had to deal with their loss of livelihood, and the issue seems unlikely to be resolved by individual negotiations with these states. States which have passed legislation and in which Amazon has cut its affiliates seem embittered beyond the point of negotiation, so this situation will likely remain unless national legislation forces Amazon to collect sales tax in all states.

### C. Texas, South Carolina, California and Tennessee

In Texas, Amazon finally cut a deal in June 2011 after a long fight, in which the state’s tax collector sent Amazon a “\$269 million tax bill, saying its distribution center in Irving establishes a legal footprint that requires it to collect sales taxes from Texas customers.”<sup>84</sup> As in many other states, Amazon retaliated against what it viewed as a hostile law: “Amazon had threatened to shut down its Irving, Texas, distribution center. Eventually it let go all 112 employees who worked there. Workers hired by a temporary employment firm are maintaining the facility.”<sup>85</sup> Finally, Amazon and the state came to an agreement: “Amazon offered Thursday to invest \$300

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<sup>80</sup> *Id.*

<sup>81</sup> Kopytoff, *supra* note 37.

<sup>82</sup> John Pletz, *Illinois' Bid to Collect Sales Taxes on Internet Shopping Comes up Empty*, CRAIN'S CHI. BUS. (Sept. 12, 2011), <http://www.chicagobusiness.com/article/20110910/ISSUE01/309109981/illinois-bid-to-collect-sales-taxes-on-internet-shopping-comes-up-empty#ixzz1jXjL7as2>.

<sup>83</sup> *Open Letter to Amazon Affiliates*, BARNES & NOBLE (Feb. 14, 2011), [http://www.barnesandnobleinc.com/press\\_releases/2011\\_feb\\_14\\_amazon\\_affiliates.html](http://www.barnesandnobleinc.com/press_releases/2011_feb_14_amazon_affiliates.html).

<sup>84</sup> Ramsey, *supra* note 47.

<sup>85</sup> Maria Halkias, *Amazon Offers Texas 5,000 Jobs in Trade for Sales-Tax Exemption*, SEATTLE TIMES (June 21, 2011), [http://seattletimes.nwsource.com/html/business/technology/2015383772\\_amazontexas22.html](http://seattletimes.nwsource.com/html/business/technology/2015383772_amazontexas22.html).

million in five or six warehouse and distribution centers in the state, employing 6,000 people, if lawmakers would let the company operate for four-and-a-half years without collecting sales taxes.”<sup>86</sup> Interestingly, Amazon also wants the state to set up “a website where its customers can send sales tax owed on Amazon purchases to the state.”<sup>87</sup> This is an appealing compromise provision, since if Texas residents began voluntarily reporting and paying sales tax on online purchases there would be no need for Amazon to collect the tax itself.

The South Carolina legislature compromised with Amazon against the wishes of the Governor, Nikki Haley.<sup>88</sup> Amazon got a five year exemption from sales tax collection in return for a promise of jobs and a \$125 million investment in the state.<sup>89</sup> Amazon also agreed to include “a clause in each purchase confirmation e-mail telling customers they could owe the sales tax to the state. The e-mail must include a link to the state Revenue Department.”<sup>90</sup> This could be a purely symbolic measure, as few customers in other states who buy online actually pay sales tax on their purchases voluntarily.<sup>91</sup> “Amazon also must send customers, either by mail or e-mail, a yearly tally of what they've spent, and specify they may owe the sales tax on their income tax returns.”<sup>92</sup> However, the state will not receive that information about online purchases, so buyers would still be able to choose not to pay the sales taxes on their online purchases with little chance of consequences from the state’s department of revenue.

Like other states, California is facing severe budget issues. Meanwhile, “only 1% of consumers pay use tax by voluntarily reporting online purchases on tax forms, and \$1.1 billion goes uncollected, according to the state's legislative analyst.”<sup>93</sup> This uncollected money is very appealing to state legislators. In June, California passed a bill to require sales tax collection by

[a]ny retailer entering into an agreement or agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an Internet-based link or an Internet Web site, or otherwise if that retailer

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<sup>86</sup> Ramsey, *supra* note 47.

<sup>87</sup> Halkias, *supra* note 85.

<sup>88</sup> Seanna Adcox, *S.C. Legislators Give Final OK to Amazon Sales-Tax Deal*, SEATTLE TIMES (June 1, 2011), [http://seattletimes.nwsources.com/html/business/technology/2015203948\\_scsalestax02.html](http://seattletimes.nwsources.com/html/business/technology/2015203948_scsalestax02.html).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Tuttle, *supra* note 11.

<sup>92</sup> Adcox, *supra* note 88.

<sup>93</sup> Bustillo & Woo, *supra* note 39.

makes more than \$10,000 on referred sales or more than \$500,000 of sales in the past 12 months in the state.<sup>94</sup>

Amazon dropped its California affiliates by August 2, 2011.<sup>95</sup> On September 9th, the California legislature printed a statement of legislative intent to clarify Assembly Bill X1 28.<sup>96</sup> The statement made it clear that “online advertising, including those ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailer websites and similar online advertising services should not be considered a ‘referral’ under subparagraph 5(A).”<sup>97</sup> The legislature explains: “Those types of advertising services are generated as a result of generic algorithmic functions and are anonymous and passive in nature and thus do not rise to the level of referring or soliciting business.”<sup>98</sup> This effectively allowed Amazon Associates to continue operating in the state without collecting sales tax.

On September 23, 2011, Amazon Associates were allowed to do business in California again.<sup>99</sup> However, this is just a compromising measure letting Amazon operate without charging sales tax for a year. According to the agreement, “Amazon agreed to start collecting the tax in September 2012 unless there was federal legislation on the issue.”<sup>100</sup> In fact, “Amazon advocates a national sales tax for online retailers, which it argues would simplify tax collection.”<sup>101</sup> However, the author of a *New York Times* article on the compromise points out that “Amazon might be trying to buy some time. If it moves several small subsidiaries out of the state, it could

<sup>94</sup> ASSEMB. B. 128, 2011–2012 Sess. (Ca. 2011), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0001-0050/abx1\\_28\\_bill\\_20110629\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0001-0050/abx1_28_bill_20110629_chaptered.pdf).

<sup>95</sup> *Recent Updates to the Associates Operating Agreement*, AMAZON.COM, [https://affiliate-program.amazon.com/gp/associates/help/operating/compare?ie=UTF8&pf\\_rd\\_t=501&ref=amb\\_link\\_353005802\\_1&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_p=&pf\\_rd\\_s=assoc-center-1&pf\\_rd\\_r=&pf\\_rd\\_i=assoc\\_operating](https://affiliate-program.amazon.com/gp/associates/help/operating/compare?ie=UTF8&pf_rd_t=501&ref=amb_link_353005802_1&pf_rd_m=ATVPDKIKX0DER&pf_rd_p=&pf_rd_s=assoc-center-1&pf_rd_r=&pf_rd_i=assoc_operating) (last visited Mar. 27, 2012); see generally *Operating Agreement*, *supra* note 27.

<sup>96</sup> ASSEMB. DAILY J. CA. LEG., 2011 Leg., 2011 1st Extraordinary Sess., at 338 (Ca. 2011), available at [http://192.234.213.35/clerkarchive/session/adj090911\\_1x.pdf](http://192.234.213.35/clerkarchive/session/adj090911_1x.pdf). This statement of legislative intent clarifies Assembly Bill 128, which amended the tax code to require sales tax collection from retailers engaged in business in the state. ASSEMB. 28, 2011 LEG., 2011 SESS. (Ca. 2011), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0001-0050/abx1\\_28\\_bill\\_20110629\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0001-0050/abx1_28_bill_20110629_chaptered.pdf).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Recent Updates to the Associates Operating Agreement*, AMAZON.COM, [https://affiliate-program.amazon.com/gp/associates/help/operating/compare?ie=UTF8&pf\\_rd\\_t=501&ref=amb\\_link\\_353005802\\_1&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_p=&pf\\_rd\\_s=assoc-center-1&pf\\_rd\\_r=&pf\\_rd\\_i=assoc\\_operating](https://affiliate-program.amazon.com/gp/associates/help/operating/compare?ie=UTF8&pf_rd_t=501&ref=amb_link_353005802_1&pf_rd_m=ATVPDKIKX0DER&pf_rd_p=&pf_rd_s=assoc-center-1&pf_rd_r=&pf_rd_i=assoc_operating) (last visited Oct. 11, 2011).

<sup>100</sup> Streitfeld, *supra* note 46.

<sup>101</sup> Woo, *supra* note 1.



argue that it no longer has the physical presence in California that requires it to collect the tax.”<sup>102</sup>

In Tennessee, Amazon had originally built distribution centers in the state on the understanding that the government would not pass laws requiring it to collect sales tax.<sup>103</sup> When the legislature wanted to pass such a law, the new governor said it would be “‘disingenuous’ to renege on the deal.”<sup>104</sup> The Governor and Amazon finally agreed on October 6 that Amazon would begin collecting sales tax in 2014, and in return for the few years’ reprieve, would build new distribution centers in Tennessee, creating 2,000 more jobs for Tennesseans, and investing \$350 million in the state.<sup>105</sup>

In Indiana, Amazon’s 2007 deal with the state government was that Amazon could build warehouses in the state in exchange for no state legislation on sales taxes.<sup>106</sup> The deal was reevaluated after Simon Properties Group, a company that owns shopping malls in Indiana, sued the state over its treatment of Amazon.<sup>107</sup> Amazon and the state finally came to a deal where Amazon would begin collecting sales tax in 2014, if there were no federal legislation passed before then.<sup>108</sup> Amazon officials expect federal legislation to pass in the next year or two.<sup>109</sup>

Indiana and Amazon officials said the 2014 start of online sales tax collections was meant to give time for Congress to act on the federal proposal. ‘We want to get it done this year, we’re hopeful,’ Misener [Amazon’s vice president for global public policy] said. ‘But we may need 2013 to accomplish it.’<sup>110</sup>

It is clear that Amazon is only willing to make these deals as a temporary measure. It will pacify states by promising to begin sales tax collection at a later date. In the meantime, Amazon has time to perfect its sales tax collection mechanisms, and its stocks will remain high as sales rise. Meanwhile, Amazon is putting its support behind legislation that will force all online retailers to collect sales tax.<sup>111</sup> As other retailers have been able to lobby for state laws forcing Amazon to collect sales tax, it is certain that if Amazon is forced to collect sales tax, it will put its power behind making sure that its competitors are held to the same standard.

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<sup>102</sup> Streitfeld, *supra* note 46.

<sup>103</sup> Schelzig, *supra* note 48.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Davies, *supra* note 49.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Woo, *supra* note 1.

## IV. SOLUTIONS

There are several possible resolutions to this conflict over collection of sales taxes on online purchases. Probably the two most likely scenarios are that after a long battle the states win one by one and Amazon ends up collecting sales tax in all states, or a national law is passed which requires all online retailers to collect sales tax. It is also possible, though unlikely, that the states will simply give up on trying to force Amazon to collect sales tax, that states' residents will begin reporting and paying sales tax on their online purchases voluntarily, or that a judicial decision will hold all such laws unconstitutional.

Small businesses could benefit in several of these scenarios. First, if the states stop battling Amazon over sales taxes, Amazon will continue its affiliate program, which helps small businesses continue to earn money as Amazon affiliates. Second, a national law requiring sales tax collection by online retailers could also be good for small businesses, but only if the process is made simple and cheap, so that small businesses can afford to comply with the complicated sales tax calculations, or small businesses are exempt from sales tax collection.

Third, if the states win, and Amazon is eventually forced to comply with state laws requiring sales tax collection, small businesses may be exempt from these laws, which usually only compel sales tax collection from companies that make a certain amount of money per year from sales arranged by affiliates in that state. Small businesses without affiliate programs, or with very small ones, would not have to collect sales taxes under these laws, which would allow small businesses to sell goods without sales tax. This could allow small businesses to have more competitive pricing with larger businesses, which benefit from economies of scale, but which would be forced to collect sales tax.

The biggest danger to small businesses is that as the battle drags on between the states and Amazon, small businesses are collateral damage. While small businesses have some influence, this battle is really being fought between Amazon and other large retailers. Neither of these have small business interests at heart.

*A. The States Accept Defeat*

Probably the ideal situation for the entrepreneurs that make up the Amazon Associates program would be for the states to cease their efforts to force Amazon to collect sales taxes. Amazon has been merciless in cutting off its Associates programs in any state that attempts to force Amazon to collect sales taxes. Comments by Jeff Bezos suggest this is not likely to change: "We will continue to drop states who pass those affiliate laws, from

the affiliate program.”<sup>112</sup> When the Associates programs are cut, these Associates must choose between a substantial loss of income or relocation to another state. Either of these options will cost the state in income taxes.

However, because the states are in such dire need of money, and especially because the weight of other big stores is behind recent pushes to force collection of sales taxes,<sup>113</sup> it is likely that this issue will not simply disappear. The states are probably also aware that there is power in numbers. For now, Amazon can continue to drop affiliates in any state which passes such a law, but after some tipping point is reached, Amazon will have to decide between collecting sales taxes in most states, and getting rid of the majority of its affiliates. Amazon seems to understand that it does not have all the power in these negotiations, as it has recently negotiated deals with California and Texas in which it promises to begin collecting sales taxes after a specified amount of time.<sup>114</sup>

While the battles are hurting entrepreneurs who work as Amazon Associates, small businesses that sell online benefit from the continued uncertainty. Until one side or the other gains a definitive victory, the small businesses that sell online are free to quietly continue selling without collecting sales taxes. As long as Amazon does not have to collect sales tax, neither do small businesses, and small businesses are likely to only have a physical presence in one or two states. This means that online sales by these businesses do not have to collect sales tax in the other forty-eight or forty-nine states.

#### *B. Amazon Makes Deals with the States*

Unless a national statute or Supreme Court ruling intervenes, it is likely that many more states will pass laws in an attempt to force online retailers to collect sales taxes. If these efforts continue, eventually Amazon will simply have to choose between the revenue it would lose by dropping all its affiliates and the revenue it would lose by collecting sales tax. Amazon has already shown its willingness to work with some states, cutting deals in California, Texas, Tennessee, and Indiana to begin collecting sales taxes after a specified amount of time.<sup>115</sup>

This would not necessarily mean that online entrepreneurs would have to collect sales tax. The new laws requiring sales tax collection in many states do not include small businesses. The New York law, for example,

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<sup>112</sup> Dhanya Skariachan, *Amazon Could Cut Ties in More States Over Tax Dispute*, REUTERS (May 11, 2011), <http://www.reuters.com/article/2011/05/11/us-amazon-idUSTRE74A7T920110511>.

<sup>113</sup> Bustillo & Woo, *supra* note 39.

<sup>114</sup> Streitfeld, *supra* note 46; Ramsey, *supra* note 47.

<sup>115</sup> Streitfeld, *supra* note 46; Ramsey, *supra* note 47.

only includes businesses that earn more than \$10,000 a year through their affiliate programs.<sup>116</sup> These laws are mostly targeted directly at Amazon, and would not affect small businesses directly.

### C. A National Law Settles the Issue

In *Quill*, the Court suggested that "Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes."<sup>117</sup> A national law requiring sales tax collection by online retailers might be a compromise solution between online retailers and states. Amazon has even stated that it is in favor of such a proposal,<sup>118</sup> possibly because if "sufficient-nexus" laws pass in enough states, they could force collection of sales taxes by Amazon and other companies with strong affiliate programs while Amazon's competitors, who have much smaller affiliate programs, will still be free to sell without collecting sales taxes. Amazon has gone so far as to send a letter of support to Senator Durbin, thanking him for his proposal of a "bill that would allow states that sufficiently simplify their rules to require collection of sales tax by out-of-state sellers,"<sup>119</sup> but it is unlikely that the bill, popularly named the Main Street Fairness Act,<sup>120</sup> will find the support necessary to become law.

A national law could force all online retailers to collect sales taxes, regardless of the amount or location of their affiliates. This would be good news for the entrepreneurial affiliates, who would continue to get their revenue from referrals, without danger of being shut down as collateral damage in the battles between Amazon and the states. However, there is a danger for small businesses. Sales tax collection is difficult, and some large retailers have had to pay penalties for mistakes in sales tax collection.<sup>121</sup> Unless the law simplifies online sales tax collection at the same time that it makes it mandatory, it will be costly for companies to comply with the laws. The Streamlined Sales and Use Tax Agreement provides a mechanism for simplifying these laws, which would allow small businesses to collect sales tax without fear of penalty and unnecessary expense.

<sup>116</sup> McKinney's New York Tax Law § 1101(b)(8)(vi) (2008).

<sup>117</sup> *Quill Corp. v. N. D. By & Through Heitkamp*, 504 U.S. 298, 318 (1992).

<sup>118</sup> Woo, *supra* note 1.

<sup>119</sup> Letter from Paul Misener, V.P. for Global Pub.Policy, Amazon.com to Dick Durbin, U.S. Sen. (July 29, 2011), *available at* [http://durbin.senate.gov/public/index.cfm/files/serve?File\\_id=a92e4a69-dba4-4aba-97a7-1a8c413ab206](http://durbin.senate.gov/public/index.cfm/files/serve?File_id=a92e4a69-dba4-4aba-97a7-1a8c413ab206) [hereinafter *Misener Letter*].

<sup>120</sup> Press Release, U.S. Sen. Dick Durbin, Durbin, Conyers, Welch and Others Introduce Bill to Level the Playing Field for Main Street Retailers (July 29, 2011), *available at* <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=9f6a8a21-02d2-4385-917d-f86a8082de60>.

<sup>121</sup> J.C.Penney, for example, has paid these penalties, which suggests that even large retailers with correspondingly large legal departments are not exempt from mistakes. Matthews, *supra* note 34.

### 1. Streamlined Sales and Use Tax Agreement

The Streamlined Sales and Use Tax Agreement (“SSUTA”) was born of a “cooperative effort of 44 states, the District of Columbia, local governments and the business community to simplify sales and use tax collection and administration by retailers and states.”<sup>122</sup> Currently, twenty-four of those forty-four states have passed legislation to comply with the agreement.<sup>123</sup> The SSUTA calls itself a “simpler, business-friendly sales tax system.”<sup>124</sup>

It makes sales taxes simpler for businesses to collect by working with private companies to create software that has accurate sales tax information; more importantly, any company that is using this software will be “immune from audit liability for the sales they process through that software.”<sup>125</sup> The states also reimburse in-state businesses their reasonable expenses required to collect sales tax; businesses with no physical presence in the state are also reimbursed their costs for using the certified software.<sup>126</sup> Furthermore, a business need not file multiple tax returns in one state.<sup>127</sup> Instead, the business would file directly with the state for all business done within that state, and the state would deal with local governments.<sup>128</sup>

Currently, sales tax collection in Streamlined Sales Tax States is voluntary, but about 1400 retailers have collected over \$700 million dollars in sales taxes.<sup>129</sup> It remains up to Congress to pass national legislation that would make this collection mandatory.

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<sup>122</sup> *Frequently Asked Questions*, STREAMLINEDSALESTAX.ORG, <http://www.streamlinedsalestax.org/index.php?page=faqs> (last visited Mar. 28, 2012) [hereinafter *Streamlined Sales Tax*].

<sup>123</sup> Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming have such legislation, and this legislation is being considered in Texas, Massachusetts, Florida, Illinois, Virginia, Missouri, Maine, California and Hawaii. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

Businesses do not have to file tax returns with each jurisdiction in which it sells a product or service. Each state provides a central point of administration for all state and local sales and use taxes and distributes the local taxes to the local governments. Each state also requires its local governments to tax and exempt the same products and services as the state.

*Id.* (emphasis in original).

<sup>128</sup> *Streamlined Sales Tax*, *supra* note 122.

<sup>129</sup> *Id.*

## 2. Main Street Fairness Act

Senator Dick Durbin has proposed a sales tax law that would implement the SSUTA nationally and require online retailers to collect sales tax.<sup>130</sup> On July 29, 2011, he presented a bill “[t]o promote simplification and fairness in the administration and collection of sales and use taxes.”<sup>131</sup> It is popularly named the Main Street Fairness Act.<sup>132</sup> The act mentions compliance with the Supreme Court’s restrictions in *Quill*, stating, “Congress may facilitate such equal taxation consistent with the United States Supreme Court’s decision in *Quill Corp. v. North Dakota*.”

In his statements, Senator Durbin explained that his bill was designed to help “level the playing-field” for small businesses.<sup>133</sup> He emphasized that the bill would not raise taxes, but would help state and local governments to collect taxes already owed.<sup>134</sup> Furthermore, individual taxpayers would no longer be required to itemize online purchases on their tax filings.<sup>135</sup>

It remains unclear how this bill would affect small businesses, since it has an exception from sales tax collection for small businesses, but it does not define small businesses.<sup>136</sup> Online auction site eBay, which makes its money facilitating sales by small businesses or individuals on the internet, is against this bill, which it says would harm small businesses. It dismisses the bill, saying: “A collection of state tax commissioners have again been able to get an outdated Internet sales tax bill introduced in Congress, but we are confident that it will be rejected because it would harm small Internet

<sup>130</sup> Main Street Fairness Act, S. 1452, 112th Cong. (2011).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> CONG. REC. S5073 (daily ed. July 29, 2011) (statement of Sen. Durbin).

If you are a small business owner in Peoria or Springfield or Alton, you compete against neighboring businesses down the street and, increasingly, with sellers on the internet. The businesses down the street have to collect the same State sales taxes that you do. But, many internet sellers don’t. That means internet sellers have a built-in price advantage. That isn’t fair, and it’s not a level playing field. The Main Street Fairness Act would address that. The bill would give Congressional endorsement to the Streamline Sales and Use Tax Agreement, which 45 States and the District of Columbia created years ago to help make it feasible for businesses selling online to collect State and local sales taxes already owed.

*Id.*

<sup>134</sup> *Id.*

<sup>135</sup> “Few consumers comply with the law today—most don’t know they should—but the Main Street Fairness Act would eliminate the need to do so.” *Id.*

<sup>136</sup> The act includes “A uniform rule to establish a small seller exception to a requirement to collect authorized by this Act” but the only explanation of the small seller exception is that it will be “adopted by the Governing Board.” Main St. Fairness Act, S.1452, 112th Cong. (2011).

retailers.”<sup>137</sup> Amazon is in favor of the bill,<sup>138</sup> probably because many recent state laws seem to be aimed directly at Amazon, and this law would make sure other internet retailers have to collect the same sales tax as Amazon. For these reasons, Amazon wants a very narrow exception for small businesses in any national legislation, while eBay wants a broadly defined exception for small businesses. The Main Street Fairness Act did not receive the support necessary to become a law, and many of its provisions were reintroduced in a new bipartisan bill, the Marketplace Fairness Act.

### *C. The Marketplace Fairness Act*

eBay’s resistance to the Main Street Fairness Act culminated on November 2, 2011 with Senate Resolution 309, a resolution “[s]upporting the preservation of Internet entrepreneurs and small businesses.”<sup>139</sup> The language is relatively vague, but it shows the Senate’s resistance to the Main Street Fairness Act because it does not define the term *small businesses*, leaving uncertainty as to which businesses would be required to collect sales tax under this legislation.<sup>140</sup>

On November 9th, Senator Dick Durbin introduced a new bill, this time with bipartisan support from Senators Mike Enzi and Lamar Alexander.<sup>141</sup> This bill is called the Marketplace Fairness Act.<sup>142</sup> One of the largest changes between the two bills is that this bill does not require implementation of the SSUTA, which some large states oppose.<sup>143</sup> The new act would allow states to choose between implementing the SSUTA or enacting “certain simple requirements for collecting the use tax, which

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<sup>137</sup> Mark Hachman, *Democrats Introduce Federal Bill to Collect Online Sales Tax*, PCMagazine (Aug. 1, 2011), <http://www.pcmag.com/article2/0,2817,2389490,00.asp#fbid=yHVEQaqOKgg> [hereinafter *Democrats Introduce Federal Bill to Collect Online Sales Tax*].

<sup>138</sup> *Misener Letter*, *supra* note 119.

<sup>139</sup> S. Res. 309, 111th Cong. (2011).

<sup>140</sup> “Congress should not enact any legislation that would grant State governments the authority to impose any new burdensome or unfair tax collecting requirements on small Internet businesses and entrepreneurs.” *Id.*

<sup>141</sup> Mark Hachman, *New Internet Sales Tax Bill Backed by Amazon, Opposed by eBay*, PCMagazine (Nov. 9, 2011), <http://www.pcmag.com/article2/0,2817,2396133,00.asp#fbid=yHVEQaqOKgg> [hereinafter *New Internet Sales Tax Bill Backed by Amazon*].

<sup>142</sup> *Id.*

<sup>143</sup> “California and other large states like New York have consistently rejected the agreement on the grounds that it limits their taxing authority.” Andrew S. Ross, *Senate Republicans Boost Online Sales-Tax Bill*, S.F. CHRON. (Nov. 11, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2011/11/10/BUG51LT7LT.DTL#ixzz1dbniN8Qj>.

include a single state agency and providing software and services to remote sellers.”<sup>144</sup>

As under the Main Street Fairness Act, small businesses would be exempt from collecting sales tax.<sup>145</sup> However, unlike the previous bill, the Marketplace Fairness Act actually defines small businesses as those with “total remote sales” less than \$500,000 per year.<sup>146</sup> This differs from all of the state laws, which only concern the sales within one state.

Despite this specificity, eBay still opposes the bill, saying the definition is too narrow.<sup>147</sup> Tod Cohen, vice president for government relations and deputy general counsel at eBay, said in a statement that the bill will hurt small businesses: “It does not make sense to expand Internet sales tax burdens on small businesses at a time when we want entrepreneurs to create jobs and economic activity.”<sup>148</sup> Representative Jackie Speier introduced a similar bill in the House, but it has a different small business exception: businesses whose annual sales are more than “\$100,000 within an individual state, and \$1 million nationwide.”<sup>149</sup>

Unsurprisingly, Amazon supports the Senate bill as it previously supported the Main Street Fairness Act, saying “Amazon strongly supports enactment of the Enzi-Durbin-Alexander bill and will work with Congress, retailers, and the states to get this bi-partisan legislation passed. [...] It’s a win-win resolution—and as analysts have noted, Amazon offers customers the best prices with or without sales tax.”<sup>150</sup> It remains to be seen whether Amazon’s support is enough to make this bill a law, but Senator Durbin is hopeful. He said the bill “really does have an amazing array of support . . . we may have finally come upon the right way to do this,” and he hoped that the bill will pass before the 2012 elections.<sup>151</sup>

It is always difficult to predict how a bill will progress, but Senator Durbin has said that he thinks the bill is “gaining momentum” but that it “needs the support of at least six more Republican senators before being

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* “The level in the bill is 60 times smaller than the U.S. Small Business Administration’s existing size standard for small online retailers, 20 times smaller than the Treasury Department’s recent proposal for a single small business standard for all small businesses, and 10 times smaller than the Small Business Exemption in Internet sales Tax bills from 2001-2008, the eBay representative said.” *Id.*

<sup>148</sup> Ross, *supra* note 143.

<sup>149</sup> “Enzi is quoted as saying he and Durbin would accept the \$1 million figure if the Senate preferred it.” *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Patrick Temple-West, *Senator Durbin: Online Sales Tax Bill Can Pass*, REUTERS (Nov. 11, 2011), <http://www.reuters.com/article/2011/11/11/us-washington-summit-salestax-f-idUSTRE7AA43620111111>.



brought for a vote.”<sup>152</sup> One of the biggest issues is that as soon as the word *tax* is mentioned, it is hard to find support. “41 of the 47 Republicans in the Senate have signed conservative activist Grover Norquist’s pledge to oppose all new taxes. But efforts are underway to make it clear to those lawmakers that the money involved is ‘a sales tax already owed,’ Durbin said.”<sup>153</sup>

## V. CONCLUSION

The tide seems to be turning on the issue of online sales tax collection. For years, it seemed that large retailers like Amazon, which did not have physical sales in a state, would not be required to collect that state’s sales tax. Customers would be required to report their online purchases on their tax filings, but few would. In the past few years, states that were desperate to balance budgets during an economic downturn have turned to sales taxes on online purchases as a source of extra revenue. This revenue is especially enticing because it does not require a state to raise taxes, only to collect taxes already owed.

However, under a Supreme Court decision, states can only tax retailers with a “substantial nexus”<sup>154</sup> in that state. This excludes retailers whose only contact with the state is by shipping purchased items using a common carrier.<sup>155</sup> However, the Court did note that Congress could make legislation forcing collection of sales taxes on all interstate sales.<sup>156</sup>

Individual states have passed legislation to force online retailers to collect sales taxes if they use in-state affiliates to make sales. Affiliates use website links to promote products on a retailer’s website. If a customer clicks through the link to the site and then makes a purchase, the affiliate receives a portion of the profits from the sale. States have passed laws requiring online sellers with significant affiliate activity in their state to collect sales tax. The reasoning behind such laws is that the affiliates create the “substantial nexus” in the state, and so the state has the right to compel collection of sales tax.<sup>157</sup>

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<sup>152</sup> Marie Wilson, *Durbin: Internet Sales Tax Bill Gaining Support*, CHI. DAILY HERALD (Jan. 13, 2012), <http://www.dailyherald.com/article/20120113/news/701139709/>.

<sup>153</sup> Susan Frick Carlman, *Durbin Seeks Online Tax as a Binding Measure*, NAPERVILLE SUN (Jan. 14, 2012), <http://napervillesun.suntimes.com/9988004-418/durbin-seeks-online-tax-as-a-binding-measure.html>.

<sup>154</sup> Quill Corp. v. N. D. By & Through Heitkamp, 504 U.S. 298, 331 (1992)

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 318.

<sup>157</sup> *Id.*

As the largest online retailer, Amazon has been affected by these laws.<sup>158</sup> It only has a physical presence in four states, and so it does not collect sales tax in most states.<sup>159</sup> It might lose as much as \$653 million in sales if it began collection of sales taxes in all states.<sup>160</sup> When New York passed a law requiring online retailers with affiliate programs to begin collecting sales taxes, Amazon immediately challenged it in court.<sup>161</sup> Though the court decided that New York's law was not unconstitutional on its face, the case is ongoing to determine if the law is unconstitutional as applied.<sup>162</sup>

When other states followed New York's lead and passed similar laws, Amazon terminated its affiliate programs in those states so that it could circumvent the laws and continue to sell to those states without collecting sales tax.<sup>163</sup> Amazon cut its programs in North Carolina, Rhode Island, Connecticut, Colorado, Arkansas and Illinois over laws forcing collection of sales taxes, and currently residents of these states cannot become part of Amazon's affiliate program.<sup>164</sup> In California and Texas, Amazon has made deals to begin collection of sales tax after a period of years.<sup>165</sup> In California, Amazon agreed to begin collecting sales tax in September 2012.<sup>166</sup> In Texas, the issue was not the affiliate program, but a warehouse that Amazon operates in Texas. When Texas sent Amazon a bill for taxes it claimed it should have been collecting, Amazon closed its warehouse.<sup>167</sup> In exchange for reopening the warehouse, Amazon will not have to collect sales tax in Texas for four and one half years.<sup>168</sup>

There are several solutions to the battles over sales tax, but the biggest concern for many is how these solutions will affect small businesses. If Amazon continues to battle the states, more affiliate programs will be cut, causing affiliates to lose their source of income. If the states win and most states pass laws requiring sales tax collection, Amazon will have to collect sales tax on all of its sales, but it is possible that small businesses will also be required to collect sales tax. This could be prohibitively costly for small businesses to be able to afford to sell products online. Another possible solution is national legislation on the issue. The Streamlined Sales and Use Tax Agreement ("SSUTA") is an initiative to simplify sales taxes

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<sup>158</sup> Woo, *supra* note 1.

<sup>159</sup> Kopytoff, *supra* note 37.

<sup>160</sup> *Id.*

<sup>161</sup> Hansell, *supra* note 41.

<sup>162</sup> Amazon.com, LLC v. N. Y. State Dept. of Taxation & Fin., 81 A.D.3d 183, 207 (2010).

<sup>163</sup> Amazon Cuts Relationship with N.C. Affiliates, *supra* note 24; Haigh, *supra* note 45; Kyung, *supra* note 45; Nesi, *supra* note 25; Moffeit, *supra* note 45.

<sup>164</sup> Operating Agreement, *supra* note 27.

<sup>165</sup> Streitfeld, *supra* note 46; Ramsey, *supra* note 47.

<sup>166</sup> Streitfeld, *supra* note 46.

<sup>167</sup> Halkias, *supra* note 85.

<sup>168</sup> Ramsey, *supra* note 47.

and make it easier for businesses to collect taxes on online purchases.<sup>169</sup> A bill called the Main Street Fairness Act was introduced to implement the SSUTA nationwide and require collection of sales tax on all online purchases.<sup>170</sup> However, there were concerns that this act would harm small businesses. There was an exception in the act so that small businesses would not be required to collect sales tax online, but the act did not define small businesses.<sup>171</sup> eBay, which facilitates online sales, often by individuals or small businesses, was concerned that this bill might lead to too narrow a definition for small businesses.<sup>172</sup>

Because of the opposition to the Main Street Fairness Act, a new bill was introduced in November 2011, the Marketplace Fairness Act.<sup>173</sup> It specifically defines small businesses, but eBay is still not happy with the definition, which it considers too narrow.<sup>174</sup> Amazon is backing this bill as it backed its predecessor.<sup>175</sup> It is hard to predict whether a bill will become law, but based on Amazon's willingness to make deals with states like California and Texas, and Amazon's support of national legislation which would force it to collect sales tax, it seems that Amazon is resigned to the idea that it will soon have to collect sales tax on all of its sales. Amazon's main concern at this point seems to be making sure that when it begins collecting sales tax, its competitors will have to do so as well.

Proponents of these laws continue to emphasize that they create fairness between different types of retailers,<sup>176</sup> but because of built-in small business exceptions, a national law might actually give small businesses an advantage. If a national law forces Amazon and other large online retailers to collect sales tax, bringing its prices closer to those of large retailers with physical stores, the only online retailers able to offer products free of sales tax would be small businesses. This could allow small online businesses to more effectively compete with large retailers.

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<sup>169</sup> *Streamlined Sales Tax*, *supra* note 122.

<sup>170</sup> Main St. Fairness Act, S.1452, 112th Cong. (2011).

<sup>171</sup> *Id.*

<sup>172</sup> *Democrats Introduce Federal Bill to Collect Online Sales Tax*, *supra* note 137.

<sup>173</sup> *New Internet Sales Tax Bill Backed by Amazon*, *supra* note 141.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> "Most small business people don't want a government handout. They don't want special treatment [ . . . ] [t]hey just want to be able to compete fairly against other businesses." *Id.*

